Hon Chung Lip v Kwan Ngen Wah & Ors

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02–99 OF 2009

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SULAIMAN DAUD, SYED AHMAD HELMY AND AZIAH ALI JJCA

16 FEBRUARY 2012

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Native Law and Custom — Land dispute — Sale of land — Whether appellant was native of Sabah — Whether judicial commissioner had jurisdiction to decide on issue as to whether appellant was native — Whether appellant had legal right or interest over lands

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The appellant had acquired 20 lots of land ('the lands') from 20 individuals (the applicants), who had successfully applied for titles to the lands from the State Government. At the time the 20 sale and purchase agreements ('the SPAs') were executed, the appellant had fully paid the purchase price to the applicants but the documents of title to the lands had yet to be issued. However, the applicants had signed valid and registrable memorandums of transfer in escrow in the appellant's favour, which were to be registered upon the issuance of the title deeds. Before the registration could be effected, the lands were transferred by the seventh respondent to the first and second respondents. The appellant claimed that this transfer was effected by the seventh respondent using a forged power of attorney purportedly signed by the applicants in his favour. The appellant thus commenced the present action for, inter alia, a declaration that he was the beneficial and legal owner of the lands. The appellant contended that the seventh respondent could not have any legal right to act for the applicants under the purported power of attorney and that since the PA was null and void, the transfer of the lands into the names of the first and second respondents was also null and void. The appellant obtained judgment in default against the seventh respondent. At the hearing before the court below, the respondents questioned the status of the appellant as a native. The judicial commissioner ('the JC') found that the appellant had obtained the native certificate illegally and that the appellant was not a native. Pursuant to this finding and premised on the law which expressly prohibited native land dealings between natives and non-natives the JC held that the SPAs executed between the appellant and the applicants were void ab initio. This was the appellant's appeal against that decision.

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Held, dismissing the appeal and awarding the first, second and third respondents costs of RM10,000:

(1) This court was of the view that the JC had erred in refusing to accept the appellant's native certificate as prima facie evidence of the appellant's

status as a native. In any case, the proper forum to raise the issue of the validity of the appellant's native certificate was before the native court and not before the JC. Thus, based on the evidence before it this court found that the appellant was a native of Sabah (see paras 8–9).

(2) At the time when the SPAs were executed the lands were still state land and the titles to the lands had not been issued to the applicants. Based on s 88 of the Sabah Land Ordinance and the case law it was found that since the applicants were merely successful applicants at the time when the SPAs were executed, they had no registered right or interest over the lands, which they could dispose to the appellant. Consequently the appellant acquired no legal right or interest over the lands that would entitle him to the declaratory order that he was the legal and beneficial owner of the lands (see paras 10–12).

(3) Although the appellant had not acquired any legal right or interest in the lands when the SPAs were executed, the SPAs were valid and enforceable. As such, the appellant was not without a remedy as against the applicants (see para 13).

[Bahasa Malaysia summary

Perayu memperoleh 20 lot tanah ('tanah-tanah tersebut') daripada 20 individu ('pemohon-pemohon'), yang berjaya memohon untuk hak milik tanah-tanah tersebut daripada Kerajaan Negeri. Pada masa kesemua 20 perjanjian jual beli ('PJB') ditandatangani, perayu telah membayar keseluruhan harga belian kepada pemohon-pemohon tetapi dokumen hak milik tanah-tanah tersebut belum dikeluarkan. Walau bagaimanapun, pemohon-pemohon telah memeterai memorandum pindah milik dalam *escrow* yang sah dan boleh didaftar bagi pihak perayu, yang sepatutnya didaftarkan sebaik sahaja surat ikatan hak milik dikeluarkan. Sebelum pendaftaran dibuat, tanah-tanah tersebut dipindah milik oleh responden ketujuh kepada responden pertama dan kedua. Perayu menyatakan bahawa pindah milik tersebut dibuat oleh responden ketujuh menggunakan surat kuasa wakil yang dipalsukan dikatakan ditandatangani oleh pemohon-pemohon bagi pihaknya. Perayu oleh itu memulakan tindakan ini untuk, antara lain, satu deklarasi bahawa dia adalah pemilik benefisial dan sah tanah-tanah tersebut. Perayu menghujah bahawa responden ketujuh tidak mungkin mempunyai apa-apa hak yang sah untuk bertindak bagi pihak pemohon-pemohon di bawah surat kuasa wakil yang dimaksudkan dan bahawa oleh sebab surat kuasa wakil tersebut adalah batal dan tidak sah, pindah milik tanah-tanah tersebut kepada nama-nama responden pertama dan kedua adalah juga batal dan tidak sah. Perayu memperoleh penghakiman ingkar terhadap responden ketujuh. Dalam perbicaraan di Mahkamah Tinggi, responden-responden mempersoalkan status perayu sebagai anak negeri. Pesuruhjaya kehakiman ('PK') mendapati bahawa perayu telah memperoleh sijil anak negeri secara tidak sah dan bahawa perayu bukan anak negeri. Berikutan dengan penemuan ini dan berasaskan

undang-undang yang secara langsung menegah urusan tanah anak negeri di antara anak negeri dan bukan anak negeri, PK memutuskan bahawa PJB yang ditandatangani di antara perayu dan pemohon-pemohon adalah batal *ab initio*. Ini adalah rayuan perayu terhadap keputusan tersebut.

Diputuskan, menolak rayuan dan mengawardkan responden-responden pertama, kedua dan ketiga kos sebanyak RM10,000:

(1) Mahkamah ini berpendapat bahawa PK telah khilaf dalam menafikan penerimaan sijil anak negeri perayu sebagai keterangan prima facie status perayu sebagai anak negeri. Walau apapun, forum yang sesuai untuk membangkitkan isu kesahan sijil anak negeri perayu adalah di Mahkamah anak negeri dan bukan di hadapan PK. Oleh demikian, berdasarkan keterangan di hadapannya, mahkamah ini mendapati bahawa perayu adalah anak negeri Sabah (lihat perenggan 8–9).

(2) Pada masa PJB ditandatangani, tanah-tanah tersebut masih tanah negeri dan hak milik tanah-tanah tersebut belum dikeluarkan kepada pemohon-pemohon. Berdasarkan kepada s 88 Ordinan Tanah Sabah dan kes-kes perundangan, didapati bahawa oleh sebab pemohon-pemohon adalah semata-mata pemohon yang berjaya pada masa PJB ditandatangani, mereka tidak mempunyai hak dan kepentingan berdaftar bagi tanah-tanah tersebut, yang boleh diberikan kepada perayu. Dengan demikian perayu tidak memperoleh hak atau kepentingan yang sah atas tanah-tanah tersebut yang memberikannya hak untuk perintah deklarasi bahawa dia merupakan pemilik sah dan benefisial tanah-tanah tersebut (lihat perenggan 10–12).

(3) Walaupun perayu tidak memperoleh apa-apa hak dan kepentingan sah di dalam tanah-tanah tersebut apabila PJB tersebut ditandatangani, PJB tersebut adalah sah dan boleh dilaksanakan. Dengan itu, perayu bukan tanpa remedi daripada pemohon-pemohon (lihat perenggan 13).]

Cases referred to

Besharapan Sdn Bhd & Ors v Agroco Plantation Sdn Bhd & Anor [2007] 1 MLJ 101; [2006] 4 CLJ 878, CA (folld)

Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd [1996] 2 MLJ 12; [1996] 2 CLJ 561, FC (folld)

Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor [1979] 2 MLJ 101; [1978] 1 LNS 44, FC (refd)

Joseph Paulus Lantip v Lian Kee Chu & Ors [2011] 6 CLJ 399; [2011] 1 LNS 542, CA (folld)

Legislation referred to

Interpretation (Definition of Native) Ordinance ss 3(2), (3), (4)
Sabah Land Ordinance (Cap 68) ss 17(1), 88

Appeal from: Civil Suit No S22–40 of 2003 (High Court, Sandakan)

Edwin Tsen (Tan Pang Tsen & Co) for the appellant.
Henri PS Cheu (Cheu Adnan & Razi) for the first, second and third respondents.
Mohd Saifurazzee Hussin (The State Attorney General's Chambers) for the fourth, fifth and sixth respondents.

Aziah Ali JCA:

[1] The learned judge of the Sandakan High Court had dismissed the appellant's claim for, inter alia, a declaration that the appellant is the beneficial and legal owner of 20 lots of land he had purchased from 20 individuals ('the applicants') who had successfully applied from the State Government a parcel of land measuring approximately 300 acres. It is not disputed that at the time the 20 sale and purchase agreements ('SPAs') were executed between the appellant and the applicants the issue document of title had yet to be issued. Having heard submissions and considered the appeal record, by a unanimous decision we dismissed the appeal and affirmed the order of the learned judicial commissioner for the reasons we set out below.

THE APPELLANT'S CASE

[2] According to the appellant he acquired rights and interests over the lands as he had fully paid the purchase price to the applicants when the SPAs were executed. The applicants had also signed valid and registrable memorandum of transfer in escrow in his favour to be registered upon issuance of the title deeds by the central land office. The applicants had also signed powers of attorney appointing him as their attorney. All the powers of attorney were registered in the Magistrate's Court at Kota Kinabalu. However the appellant says that the sale and purchase transactions could not be completed because the lands were transferred to the first and second respondents using a forged power of attorney purportedly signed by the applicants in favour of the seventh respondent and a purported substitution under a power of attorney ('SUPA') between the seventh respondent and the first and second respondents which enabled the first and second respondents to collect the draft title deeds and thereafter transferred the lands to their names. The first and second respondents subsequently leased the lands to the third respondent.

[3] It is the appellant's case that the applicants are bare trustees for him and he is the beneficial and legal owner of the lands. The appellant contends that the seventh respondent could not have any legal right to act for the applicants under the purported powers of attorney and to execute any SUPA to the first and second respondents. The appellant says both the powers of attorneys and the SUPA are null and void and the transfer of the lands into the names of the

first and second respondents are null and void. On 18 September 2006 the appellant obtained judgment in default against the seventh respondent. A

THE APPEAL

[4] In the appeal before us two issues were raised as follows: B

(a) the appellant's status as a native; and

(b) the appellant's rights to the land.

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THE APPELLANT'S STATUS AS A NATIVE

[5] At the hearing in the court below the appellant produced his 'anak negeri certificate' ('native certificate') and a letter from the *mahkamah anak negeri* ('native court') dated 19 May 2000 which states that the certificate was issued to the appellant. A perusal of the appeal records shows that the appellant (PW10) was cross-examined on his native certificate and through his answer it was established that both the appellant's parents were born in China. The appellant admitted that he obtained the native certificate through his friend. In cross-examination by counsel for the fourth, fifth and sixth respondents the appellant confirmed that there was no hearing held on his application for the certificate. In re-examination the appellant said that his native certificate has not been revoked or declared null and void by the native court (p 245 of the appeal record). D E F

[6] Before the learned judicial commissioner counsel for the respondents submits that the appellant has acquired his native certificate illegally and he was therefore not actually a native. Hence counsel submits that the appellant is not entitled to the reliefs sought. For the appellant it is submitted that the respondents are estopped from raising this issue which was not pleaded. Further it is submitted that the appellant's native certificate is prima facie evidence that the appellant is a native and the proper forum to decide on this issue is the native court. G H

[7] The learned judicial commissioner is of the view that illegality need not be pleaded and based on the appellant's own admission the learned judicial commissioner found that the appellant has obtained the native certificate illegally and therefore the appellant is actually not a native. Pursuant to this finding and premised on s 17(1) of the Sabah Land Ordinance (Cap 68) which expressly prohibits dealings of native lands between natives and non-natives, the learned judicial commissioner held that the SPAs and powers of attorney executed between the appellant and the applicants are void ab initio. I

[8] Section 3(2) of the Interpretation (Definition of Native) Ordinance (Cap 64) provides that the native court shall have exclusive jurisdiction to entertain and determine any application made to it by a person for a declaration that such a person falls within one of the paras (a)–(d) of the said provision. From the learned judicial commissioner's grounds of judgment, we find that despite acknowledging that s 3(2) confers exclusive jurisdiction on the native court to make declarations that any person is a native of Sabah, the learned judicial commissioner appears not to have accepted the documents produced by the appellant apparently because the said letter did not deal with how the certificate was obtained.

[9] We refer to the decision of this court in the case of *Joseph Paulus Lantip v Lian Kee Chu & Ors* [2011] 6 CLJ 399; [2011] 1 LNS 542. In that case Low Hop Bing JCA said that 'the certificate of the Sabah Native Court declaring the first defendant as a native of Sabah, in the absence of an appeal against that declaration, is conclusive evidence that the first defendant is a native of Sabah. As it is a final decision, the High Court had correctly accepted it as such'. In support His Lordship cites the case of *Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor* [1979] 2 MLJ 101; [1978] 1 LNS 44 wherein Suffian LP said:

> The decision of the native court declaring the applicant a Native of Sabah is a final decision (it cannot now be reversed) and is thus conclusive evidence for the purpose of the Immigration law that he is a Native of Borneo.

Lee Hun Hoe CJ (Borneo) said in the same case:

> Section 3(2) of the Ordinance makes clear that the Native Court shall have exclusive jurisdiction to entertain and determine such application and to make such declaration. Section 3(3) of the Ordinance provides that there may be an appeal against such declaration as if it were a proceeding or order of the court. Any appeal against such decision would be governed by the provisions of the Native Courts Ordinance (Cap 86). As there has been no appeal the declaration is binding for s 3(4) of the Cap 64 states that such declaration made shall be conclusive evidence for all purposes in respect of the matter or matters to which it relates. The implication is that appellant is considered a native in Sabah and is entitled to be treated as such under the immigration law. As a native he belongs to Sabah.

We fully agree with Low Hop Bing JCA in *Joseph Paulus Lantip* and we are of the view that the learned judicial commissioner has erred in refusing to accept the appellant's native certificate as prima facie evidence of the appellant's status as a native. We agree with leamed counsel for the appellant that the proper forum to raise the issue of the validity of the appellant's native certificate before the native court and not before the learned judicial commissioner. On the evidence before us we find that the appellant is a native of Sabah.

THE APPELLANT'S RIGHTS TO THE LAND

[10] We were referred to s 88 of the Sabah Land Ordinance which provides as follows:

> No title or claim to land valid unless registered
>
> 88 No new title and no dealing with, claim to or interest in any land except land still held under native customary tenure without documentary title shall be valid until it has been registered in accordance with the provisions of this Part.

[11] In *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12; [1996] 2 CLJ 561 the Federal Court said, inter alia, that s 88 prohibits the acquisition of a legal estate or interest in land except by registration and that registration is a condition precedent for the recognition of the validity of any new title to or dealing with or claim to or interest in any land and that title to or interest in land vests and divests only upon registration. In the later case of *Besharapan Sdn Bhd & Ors v Agroco Plantation Sdn Bhd & Anor* [2007] 1 MLJ 101; [2006] 4 CLJ 878 the facts show that the subject land was yet to be registered in the appellants' names at the time of execution of the agreement. Based on s 88 the appellants claimed they did not have any right or interest over the subject land that was capable of being disposed to the first respondent. In its judgment the court affirmed the position that on the date of execution of the agreement the second and third appellants did not have any registered right or interest in the subject land.

[12] It is not disputed that at the time the SPAs were executed the lands were still state land and titles to the lands had not been issued to the applicants. Based on s 88 and following the abovementioned authorities we find that since the applicants were merely successful applicants at the time when the SPAs were executed, these applicants had no registered right or interest over the lands which they could dispose to the appellant. Consequently the appellant acquired no legal right or interest over the lands to entitle him to the declaratory order that he is the legal and beneficial owner of the 20 lots of land.

[13] The question that arises then is what is the status of the SPAs entered into between the appellants and the applicants. This was answered in *Besharapan Sdn Bhd & Ors* wherein Arifin Zakaria JCA (now CJ) said, inter alia, as follows:

> … it is our view that even though on the date of execution of the 1989 agreement the second and third appellants did not have any registered right or interest in the subject land that does not render the agreement which is otherwise valid and enforceable to be void or invalid. We hold that second and third appellants at the material time have sufficient interest in the subject land to enter into a binding

A agreement by which they agreed to transfer the subject land when the title or interest in the subject has been registered in their names. In other words the parties agreed that the agreement will only become enforceable the moment the second and third appellants' right or interest in the subject land is registered under the Ordinance. We find no difficulty with such an arrangement. For the above reasons we find no merit in the first ground canvassed before us by the appellants.

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Thus despite our finding that the appellant has not acquired any legal right or interest in the lands, we are of the view that the SPAs are valid and enforceable and that the appellant is not without a remedy as against the applicants.

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[14] For the reasons stated above we dismissed the appeal and awarded costs of RM10,000 to the first, second and third respondents. No cost was awarded to the fourth, fifth and sixth respondents. The deposit is awarded to the first, second and third respondents to account for costs.

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Appeal dismissed and first, second and third respondents awarded costs of RM10,000.

Reported by Kohila Nesan

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